BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by Maxwell B. Nelson dated July 13, 1989, alleging discrimination in employment on the basis of race and colour.

B E T W E E N :

Ontario Human Rights Commission

- and -

Maxwell B. Nelson

Complainant

- and -

Durham Board of Education
and Don Peel

Respondents

INTERIM DECISION

Adjudicator : Gerry K. McNeilly

Date : March 25, 1997

Board File No: BI-0095-96

Decision No : 97-009-I

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission	)	Anthony D. Griffin, Counsel
Maxwell B. Nelson, Complainant	)	Cynthia Petersen, Counsel
Durham Board of Education, Corporate Respondent	)	Patricia Murray, Counsel Craig Birch
Don Peel, Personal Respondent	)	Patricia Murray, Counsel

DECISION

This complaint involves a claim by Maxwell Nelson alleging discrimination in employment on the basis of race and colour, contrary to ss. 5 and 9 of the *Human Rights Code*, R.S. O. 1990, c. H. 19 as amended.

This is a decision on a preliminary motion made by the Respondents, the Durham Board of Education and Don Peel (the complaint against the Personal Respondent, Chuck Rivers, was withdrawn) that these proceedings be dismissed or permanently stayed on the grounds that:

a. the process followed by the Commission and its staff leading to a decision to refer the complaint to the Board of Inquiry is an abuse of process;

b. the process followed was a breach of procedural fairness and natural justice;

c. a fair hearing cannot be held because of the lapse in time between the events alleged in the complaint and the referral to the Board of Inquiry;

d. the Commission failed to apply section 34(1)(d) of the Ontario *Human Rights Code*; and

e. there was no evidence to warrant referral to the Board of Inquiry as mandated by section 36(1) of the *Code*.

Evidence was called by the Respondents only. All parties made extensive arguments at the conclusion of the Respondents' evidence.

Facts

Mr. Nelson started with the Ministry of Health as a teacher in 1969 at the Treatment Centre School. The school was a separate and distinct part of the Durham Board system. Classes were smaller because students had some special needs. The teachers and the administration in the school had a very different outlook from the regular school system, given the specialization required to teach there. Mr. Nelson started working with the Durham Board of Education in 1975 continuing in his role and title of a Supervising Teacher. This role and title was changed to "Assistant to the Principal" when the Durham Board assumed responsibility for the Treatment Centre School.

In 1976, Mr. Nelson applied to the Durham Board for permission to take the Ministry of Education Principals Course. This permission was refused. In 1977, all "Assistants to the Principal" were

reclassified by the Durham Board as "Vice-Principals, 'B'". Mr. Nelson thus became the only Black Vice-Principal in the Durham Board of Education.

During the years 1975 to 1983, Mr. Nelson alleges that, contrary to the Board's procedure of rotating Vice-Principals every three to five years, he was not rotated and was therefore denied the opportunity of gaining the required experience. During the period 1980 to 1985, he attempted to realise a parallel transfer or promotion. He was granted only two interviews and was unsuccessful in obtaining a transfer or a promotion.

In 1980, Mr. Nelson again applied for permission to take the Principals Course, permission was granted for Part I in 1981 and Part II in 1982.

From 1980 to 1985, he responded to postings for the position of Principal. He was granted interviews but was not promoted.

Mr. Nelson transferred to Lake Vista school in 1987, a regular school within the Durham Board. He complained to the Human Rights Commission soon thereafter that he remained a Vice Principal and was not promoted because of race. The Board took the position that he was not promoted because he did not have the necessary experience and exposure in the regular school system.

The complaint was first filed in March 1989 and refiled as amended July 12, 1989. Mr. Nelson alleged that he had been discriminated against on the basis of colour and race contrary to the *Human Rights Code* in that he was denied advancement to the position of Principal within the Durham Board of Education. The incidents complained of commence in 1976, the early teaching years of the Complainant, when he started to apply for permission to take the Principals course.

The complaint was assigned to an Investigation Officer on July 4, 1989. The Respondents were contacted by telephone soon thereafter and by letter on July 17, 1989 to advise that the complaint would be sent to them. The Respondents sought an extension of time for response to the complaint by letter dated July 20, 1989 given the vacation period. The Commission granted an extension to mid September of that year.

A chronology of events from July 12, 1989 to May 23, 1996 follows:

1.	Date complaint signed:	12 Jul 1989
2.	Date complaint served:	14 Jul 1989
3.	Date of receipt of Respondent's questionnaire:	27 Mar 1990
4.	Date investigation began:	30 Oct 1991
5.	Date investigation completed:	27 Sep 1995

6.	Date of attempted conciliation:	29 Sep 1995
7.	Date of case analysis:	05 Oct 1995
8.	Date of disclosure:	09 Nov 1995
9.	Date of Complainant's submission:	14 Dec 1995
10.	Date of Respondents' submission:	No Sub. Received
11.	Date of Officer's comments:	12 Dec 1995
12.	Date of Case Co-ordinators review:	13 Dec 1995
13.	Date of Manager's approval:	13 Dec 1995
14.	Date sent to Head Office:	22 Dec 1995
15.	Date of Commissioners decision to refer to the Board	01 May 1996
16.	Date referral received by the Board	23 May 1996

The Respondents take the position that the two Human Rights investigators assigned to the complaint were very experienced and their independent recommendations of No Board should have been accepted by the Commissioners. The Human Rights Officers, Mr. Doug Kelly and Ms. Valerie Pollak, gave evidence before the Board on their investigation of the complaint and the conclusions contained in their Reports.

The Respondents are particularly concerned that the involvement of the Systemic Investigations and Special Programs Section in the investigation process and, in particular the decision to intervene and give directions to the Human Rights Officers, caused, at least Mr. Kelly, to change his recommendation about referral to a Board. The Respondents took the view that because Mr. Kelly was told his analysis was wrong and that he did not understand the theory of the case, he reversed his decision and recommended a Board. This, the Respondents contend, constituted political pressure, and, as a result, bias and/or an abuse of process making it impossible for the Respondents to get a fair hearing or to be able to defend this case.

Further, Respondents' Counsel argued that comments by the Chief Commissioner "that any shred of evidence is enough evidence to send a matter to a Board," tainted the process. This comment was apparently made at a regular meeting between staff and the Chief Commissioner, sometime during her short time in office, before she passed away.

With respect to the delay in referring this matter to the Board, the Respondents take the position that because the incidents complained of span 11 years, the memories of witnesses will not be good. Further, many of its witnesses are now retired, documents cannot be located, and these factors will make it difficult to defend the case.

Counsel for the Respondents submitted that it was not until 9 years following the filing of the complaint that the Respondents were given any inkling that the matter would be referred to the Board, even though there were ongoing communications between the Respondents and the

Commission. This time span, she contends, amounts to delay and, combined with the administrative bungling she believed occurred here, is an abuse of process.

Argument - Respondents' Submissions

Counsel for the Respondents argued that, as a result of the series of events and facts outlined above, there is sufficient prejudice to the Respondents that the Board should determine that it has no jurisdiction to proceed further. Specifically, the Board should question why this complaint was referred for hearing given the absence of any evidence from the Commission as to what information it relied upon in arriving at its decision to refer this matter to the Board of Inquiry. In her submission, the manner in which this complaint proceeded through the Commission should cause me to believe:

a. that this complaint was administratively bungled over a 9-year period resulting a delay which has prejudiced the Respondents' ability to present their defence;

b. that some kind of bias against the Respondents existed;

c. that some kind of political pressure on the investigations by the Chief Commissioner existed;

d. that there was some internal prejudgment of the issues in this complaint by the staff of the Commission, the Chief Commissioner and the Systemic Branch;

e. that the Commission was determined to refer this complaint to the Board notwithstanding the conclusions of the two Human Rights Officers who investigated this complaint; and

f. the result is that a hearing before the Board in these circumstances would be an abuse of process.

Counsel agreed that it was the role of the Human Rights Officers to evaluate the evidence and make recommendations, which they did, and that it was the role of the Commissioners, in their discretion, to determine whether to refer the complaint for hearing before the Board of Inquiry. But, in her submission, the Commissioners' discretion to refer this matter was exercised improperly and in response to political exigencies. There was no valid complaint; this was simply a political "hot potato". Further, because the matter alleged discrimination of a systemic nature and it was the position of the then Chief Commissioner that any matter of this nature should be referred to a Board for a hearing, the Commission had its mind made up that this matter would be referred to a Board.

Finally, the Respondents were not made aware of the information or material which the Commissioners relied on to make their decision until January 1997. Counsel asserted that, as a result, the Board would have no way of knowing what the Commissioners knew or what information they had before them when making the decision to refer. This, she asserted, supports the Respondents' view that it was pre-determined that this matter would be referred to the Board of Inquiry.

Complainant's Submissions

Counsel for the Complainant agreed that the Board has the jurisdiction to entertain this motion but that the power to dismiss complaints at this stage of the process has been acted upon sparingly. Counsel noted that the Complainant has no control over the process once he enters the process and that it is the Commission which has carriage of the matter.

Counsel argued that the Complainant was in no way responsible for the delay nor was he in any way responsible or involved in the decision to have the matter re-investigated by the Commission. Finally, the Complainant had no involvement in the decision of the Commissioners to refer the matter to the Board of Inquiry.

Counsel further argued that the Board is not to sit in review of the Commission and its process. Rather, the Board has to concern itself with the issue of fairness. Was the process fair to the parties? That is, was the process followed by the Commission fair to both the Complainant and the Respondents? Counsel argued that the issue of delay is not one I need to concern myself with at this time. The fact that some witnesses are now retired or that some documents are not available or no longer exist, are all factors that will go to the weight given to the evidence adduced by the parties.

Finally, Counsel asserted that the evidence adduced by Respondents' Counsel on this motion does not show any impropriety or bias on the part of the investigation or the Commission. Further, there is no evidence of political pressure, as alleged by the Respondents, exerted in this matter to ensure that the complaint was referred to a Board. Nor was there any evidence adduced to show that the Commission acted in any way contrary to set policies and procedures.

Commission's Submissions

Counsel for the Commission adopted some aspects of the argument of Complainant's counsel, except for those comments and submissions that speak against the Commission and its process. He explained to the Board the difference between ss. 34, 36 and 39 of the *Human Rights Code* and

explained the role and duty of the Commission. He specifically indicated that the Commission is expressly given the discretion to deal with a complaint or not, to investigate or not.

Counsel argued that once the Commission conducts an investigation and attempts to effect a settlement, it then puts a summary of the investigation with a recommendation whether or not to refer to the Board of Inquiry before the Commissioners. Once the summary is before the Commissioners, the decision to refer, is theirs and theirs alone. The Commissioners have to consider what is before them and, after due consideration, ask themselves whether an inquiry is warranted. It is not the role of the Board of Inquiry to second guess that process.

Counsel further argued that the Commissioners may arrive at a different decision than that recommended by the staff. The Commissioners apply their own analysis based on the submissions before them and then exercise their discretion. In making their determination the Commissioners owe a duty of fairness to all parties, to give them an opportunity to respond and to be heard, and that duty was fulfilled in this case. With respect to the question of delay, Counsel noted that, during the initial period after the complaint was filed, the Commission agreed to permit the Respondents additional time to file their response. He concluded that there was no evidence of any bias being exercised by the Commissioners nor has any prejudice to the Respondents been established or shown.

The Issues

1. Is the delay in bringing this complaint before the Board of Inquiry and/or the alleged bias sufficient to cause the Respondents such prejudice that the complaint should be dismissed as an abuse of process?

2. Are portions of the complaint untimely as being outside the provisions of s. 34(1)(d)?

3. Was there sufficient evidence before the Commissioners to warrant referral to the Board of Inquiry?

It is now settled law that it is the duty of the Board of Inquiry to decide in the first instance whether a complaint should be stayed or dismissed for delay (see *Latif v. OHRC et. al.* Ont. Div. Ct. unreported, March 11, 1992; leave to appeal refused, June 8, 1992).

Issue 1 - Delay

The Respondents argue that a fair hearing cannot be held because of the lapse of time between the events alleged in the complaint and the referral to the Board. While the Board cannot condone the length of time this matter took in the Commission system before the referral was made, blame cannot be placed squarely upon either the Complainant or the Commission. Surely, one has to conclude that the process employed by the Commission in processing this complaint was not satisfactory. In fairness to the Commission, the documentation filed and the evidence adduced does not indicate why the Respondents are of the view that this matter was not being processed efficiently. The Commission was at all times proceeding with this matter in accordance with its Procedures Manual. The evidence presented indicated that the investigation was conducted more or less over a 4-year period from October 30, 1991 to September 27, 1995. This was during the Commission's backlog problems when cases were proceeding more slowly than usual. Additionally, there were 3 investigations conducted by two different investigators. Finally, it is acknowledged that there were difficulties in scheduling appointments with the Respondents and their witnesses given school vacations and retirements.

The complaint was communicated to the Respondents expeditiously. Correspondence and communications between the Respondents and the Commission commenced soon thereafter. Given that the Corporate Respondent is a School Board and the Personal Respondent a School Superintendent, school vacations and breaks created problems for the investigation. Specifically, the Respondents requested extensions as a result of school vacation periods. First by letter of July 20, 1989 and again by letter of August 20, 1989 the Respondents requested an extension beyond September 11, 1989 to file their response due to a variety of factors including the beginning of the school year and the length of the complaint. In fact, the response was not filed until March 27, 1990. Finally, as stated in the evidence of the two investigators, there were 22 School Board witnesses to be interviewed and there were some difficulties and delays in arranging these interviews.

In considering whether the delay between the events complained of and the referral to hearing is sufficient to require the dismissal of the complaint, the Divisional Court's recent decision in *Ford Motor Co. Of Canada* v. *Ontario (Human Rights Commission)* (1995) 24 C.H.R.R. D/465 follows the Manitoba Court of Appeal's approach in *Nisbett* v. *Manitoba (Human Rights Commission)* (1993), 18 CHRR D/504 . Specifically, the Divisional Court concludes:

> The proper test on the issue of prejudice to determine whether a hearing can proceed without a denial of natural justice or abuse of process is properly set out in the *Nisbett* case, *supra,* at D/510 [para. 33] and we adopt it as follows:

> The question is simply whether or not on the record there has been demonstrated evidence of prejudice of sufficient magnitude to impact on the fairness of the hearing. (emphasis mine)

The Court is clearly stating that the test to be applied to determine whether prejudice caused by delay is sufficient to require dismissal of a complaint is whether the prejudice is of sufficient magnitude to constitute an abuse of process or denial of natural justice.

In assessing whether the lapse in time between events alleged in the complaint and the referral to the Board meets this test, other Board of Inquiry decisions are illustrative. In *Guthro* v. *Westinghouse Canada Inc. (No. 2)* (1991) C.H.R.R. D/388 at D/391 Chairperson Gorsky stated:

> The prejudice to a party occasioned by delay must indicate more than inconvenience; it must be sufficiently oppressive to prevent a response or defence from being made. An unreasonable delay creates an insurmountable problem: a key witness has died, documentary evidence has been destroyed, or some other circumstance has limited the opportunity to defend against the allegations in the complaint.

In *Simms* v. *Seetech Metal Products* (1993), 20 C.H.R.R. D/477 Chairperson Cummings, as he then was, concluded:

> .....alternatively, the delay constitutes an "abuse of process" because the passage of time has so prejudiced the Respondent that it would be unfair to proceed further.

Other Board of Inquiry decisions reason that before a dismissal for delay is granted, parties must be able to prove that it would be difficult to proceed because witnesses memories have faded by the passage of time or key witnesses cannot be located or are no longer available due to death or serious illness. Finally, they must be able to establish that significant documentary evidence has been destroyed. See *Meissner* v. *506765 Ontario Ltd.* (1989), 11 C.H.R.R. D/94; *Hyman* v. *Southam Murray Printing* (No. 1) (1981), 3 C.H.R.R. D/617.

After reviewing the evidence, I am not convinced there has been prejudice of the magnitude contemplated by the Manitoba Court of Appeal in *Nisbett*. The Respondents were notified almost immediately after the complaint was filed, they were in constant correspondence with the Commission, they requested extension of time frames, which they were given. The documentary evidence is available or can be obtained albeit not without a great amount of clerical work. With the exception of one witness, all the Respondents' witnesses are available to give evidence. There is no indication that witnesses' memories have faded to the extent that their evidence will not be credible. While I am prepared to accept that memories may not be as sharp as they would have otherwise been had the lapse of time not occurred, there is no evidence to show that this would cause

undue prejudice to the Respondents. In any event, this can be taken into consideration when arguments are made on the weight to be given to the evidence and the fashioning of a remedy if necessary.

It need also be said that if the Board easily dismisses complaints because of delay, delay which on the main is caused by the Commission, complainants will be the party most severely prejudiced. Access to the civil litigation process for breaches of the *Code* is prevented by the Supreme Court's decision in *Bhadauria* (*Seneca College of Applied Arts and Technology v. Bhadauria [1981] 2 S.C.R. 181].*

Except in the circumstances contemplated by *Nisbett*, neither complainants nor respondents, should be precluded from having a hearing because of delay caused by the Commission's process.

Regarding the involvement of the Systemic Unit in this matter, the evidence does not indicate that the decision to involve the Systemic Unit was made for any improper motive. It was reasonable for the Commission, in the course of its investigation, to call upon this specialised resource. Given that, in accordance with its policies, it is not unusual for investigators to consult with different branches, such as the Systemic Branch, the Policy Branch and their own branch, the Investigation Branch, the fact of the consultation alone does not constitute delay or create bias against the Respondents.

Further, the Respondents' submissions that the investigation, the involvement of the Systemic Unit and comments made by the then Chief Commissioner were politically motivated are without foundation or evidence. The evidence presented does not in any way substantiate the claim that the comments made by the then Chief Commissioner, Ms. Endicott, that "any shred of evidence is enough evidence to refer the matter to the Board" prejudged or biased the investigation process. Moreover, Counsel made no argument connecting this statement to the legal tests established for bias or apprehension of bias. I note that the Chief Commissioner does not make the decision to refer. The decision is made by the full Commission, which is what was done in this matter.

Issue 2: Complaint Untimely

The Respondent alleges that the Commission ought to have complied with section 34(1)(d) and refused to consider the complaint as it was based on facts which occurred more than six months prior to filing .

Section 34(1) of the *Code* states:

> Where it appears to the Commission that, ...
>
> (d) the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay, the Commission may, in its discretion, decide not to deal with the complaint.

In my view, section 34(1)(d) of the *Code* gives the Commission a very broad discretion to accept or refuse a complaint in these circumstances. The Respondents suggest that because some of the events stated in the complaint fall outside the six month window that should be sufficient to justify dismissal of the complaint for being out of time. I do not agree. The events complained about allege a pattern of systemic discrimination, a pattern which is unlikely to become immediately apparent to a complainant. It seems reasonable in those circumstances for the Commission to have exercised its discretion as it did. The Respondents have not submitted any evidence that the decision made by the Commission under s. 34(1)(d) was unfair or improper. Moreover, I note that they did not seek to judicially review the Commission's decision when it first accepted the complaint, commenced investigation, or made the decision to refer to the Board.

In these circumstances I see no reason to dismiss the complaint on this ground.

Issue 3 - No Evidence to Justify Referral

Section 36 of the *Code* states:

> Where the Commission does not effect a settlement of the complaint and it appears to the Commission that the procedure is appropriate and the evidence warrants an inquiry, the Commission may refer to subject-matter of the complaint to the Board of Inquiry. (emphasis mine)

In this matter no settlement was achieved. The next step was for the Commission to determine if the evidence warranted an inquiry. It appears that, on the evidence before it, namely, the case disposition package filed in these proceedings as exhibit 4, which includes *inter alia*, the documents listed in the chronology of events referred to earlier, plus another policy memorandum stating that there was disagreement with Investigator Pollak's recommendations and summary, the Commission concluded that an inquiry was warranted. In my view, as long as there was some evidence before the Commission when it makes its decision pursuant to s. 36(1) of the *Code* that is sufficient to satisfy the preconditions for the exercise of the Board's powers on referral of the complaint. An

evaluation of the adequacy of that evidence or the manner in which it ought to have been considered is for the Court to make on a judicial review application.

In conclusion, the Respondents' motions are dismissed. The hearing will reconvene on Friday, the 4th day of April, 1997 at 9:30 a.m., as scheduled.

Dated this 25th day of March, 1997.

Gerry K. McNeilly
Chair, Board of Inquiry